HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE KATHERINE OLEJNIK, Grand Jury Witness, IN RE MATTHEW DURAN, Grand Jury Witness.	CASE NO. 12-GJ-145 CASE NO. 12-GJ-149 ORDER

I. INTRODUCTION

This matter comes before the court on motions from grand jury witnesses Katherine Olejnik and Matthew Duran to end their confinement for civil contempt. No. 12-GJ-145, Dkt. # 24; No. 12-GJ-149, Dkt. # 35. For the reasons stated below, the court GRANTS both motions and orders that Ms. Olejnik and Mr. Duran are to be released from custody no later than 4:00 p.m. on February 28, 2013.

II. BACKGROUND

One or more grand juries empaneled in the United States District Court for the Western District of Washington subpoenaed Katherine Olejnik and Matthew Duran to provide testimony related to an investigation. Both witnesses refused to answer at least some of the grand jury's questions. At a hearing on September 13, 2012, the court held Mr. Duran in civil contempt and, at the Government's request, ordered him confined until he either agreed to testify or until the expiration of the grand jury's term. *See* 28 U.S.C. § 1826. The court ordered a status hearing for Mr. Duran on September 26, at which time

he confirmed his refusal to testify and declined the court's offer to periodically hold status hearings. At a September 27 hearing, the court found Ms. Olejnik in civil contempt and ordered her confined until she either agreed to testify or until the expiration of the grand jury's term. *See id.* Both witnesses unsuccessfully appealed the court's contempt findings. Both witnesses remain confined at the Federal Detention Center in SeaTac.

After five months of confinement, both witnesses reiterate their refusal to answer the grand jury's questions, but both ask the court to release them on the ground that continued confinement will not coerce their testimony.

III. ANALYSIS

When a witness unlawfully refuses to answer questions from a grand jury, a court has authority to declare her in civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). In those cases, the purpose of confinement following a finding of civil contempt is to coerce the witness's testimony. *Id.* at 371. The confinement must end, for example, when the term of the grand jury expires (because the witness cannot testify before a grand jury that does not exist), or when the witness chooses to testify. *Id.*

Due process also demands, however, that the court end confinement where it is substantially likely that the witness's confinement is no longer coercive. *Lambert v. Montana*, 545 F.2d 87, 91 (9th Cir. 1976). Confinement without the possibility of coercing testimony is purely punitive, and falls within the realm of criminal law. *Id.* at 90. So far as the court is aware, the Government has not charged either Ms. Olejnik or Mr. Duran with criminal contempt.

Several federal courts of appeal, including the Ninth Circuit, have offered instruction on determining whether confinement for civil contempt has ceased to be coercive. Each of them requires a court to conduct an individualized assessment of whether the contemnor is likely to testify. *E.g.*, *SEC v. Elmas Trading Corp.*, 824 F.2d

732, 733 (9th Cir. 1987); *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); *In re Crededio*, 759 F.2d 589, 592 (7th Cir. 1985). The burden is on the contemnor to persuade the court. *Simkin*, 715 F.2d at 37; *In re Grand Jury Investigation (Braun)*, 600 F.2d 420, 425 (3d Cir. 1979). Acknowledging that the Recalcitrant Witness Statute places an eighteen-month limit on confinement for civil contempt, *see* 28 U.S.C. § 1826(a), some courts urge reluctance in finding that confinement for fewer than eighteen months has lost its coercive character. *Braun*, 600 F.2d at 427 ("[W]e are reluctant to conclude, in the absence of unusual circumstances, that, as a matter cognizable under due process, confinement for civil contempt that has not yet reached the eighteen-month limit has nonetheless lost its coercive impact and become punitive."); *see also Simkin*, 715 F.2d at 37. All of these courts recognize, however, that a trial court has discretion to decide whether periods of confinement of fewer than 18 months have lost their power to coerce. *Elmas Trading*, 824 F.2d at 733; *Simkin*, 715 F.2d at 38 ("[W]e think a district judge has virtually unreviewable discretion both as to the procedure he will use to reach his conclusion, and as to the merits of his conclusion."); *Braun*, 600 F.2d at 428; *Crededio*, 759 F.2d at 591.

Both Ms. Olejnik and Mr. Duran have provided extensive declarations explaining that although they wish to end their confinement, they will never end their confinement by testifying. The court finds their declarations persuasive. They have submitted to five months of confinement. For a substantial portion of that confinement, they have been held in the special housing unit of the Federal Detention Center at SeaTac, during which they have had no contact with other detainees, very little contact even with prison staff, and exceedingly limited ability to communicate with the outside world. Mr. Duran was confined in the special housing unit for the first two weeks of his confinement, was placed there again on December 27, and has remained there since. Ms. Olejnik spent the first six days of her confinement in the special housing unit, was placed there again on

December 27, and remained there at least through February 12. The Government states that she has recently been returned to general population. The Government does not dispute the witnesses' assertions that confinement in the special housing unit entails 23 hours of solitary confinement in their cells and an hour of solitary time alone in a larger room each day, a single fifteen-minute phone call each month (as opposed to five hours of monthly phone time for detainees outside the special housing unit), and exceedingly limited access to reading and writing material. Their physical health has deteriorated sharply and their mental health has also suffered from the effects of solitary confinement. Their confinement has cost them; they have suffered the loss of jobs, income, and important personal relationships. They face the possibility of criminal convictions for contempt. Ms. Olejnik plausibly explains, moreover, that she would face ostracism within her community of friends if she were to testify, based on the experience of another grand jury witness within her community who she believes chose to testify rather than face continued confinement. Both she and Mr. Duran have nonetheless refused to testify.

The Government rebuts none of the assertions in Ms. Olejnik's or Mr. Duran's declarations. The Government suggests no reason to disbelieve those assertions. The Government suggests no particular reason for the court to conclude that there is a substantial likelihood either witness will testify if the court continues their confinement. Indeed, the court queries whether it can characterize the Government's opposition to their motions as an opposition to their requests for release. The Government merely insists that their written statements are insufficient to carry their burden, and that the court should "hear from [each witness] and others to assess whether [he or] she has established a due process violation."

The court finds no need to have the witnesses confirm their written statements at a hearing. There is no reason to suspect their testimony at a hearing would be any different (with respect to the central inquiry relevant to their release). The Government does not

suggest that the witnesses will testify differently, or will offer additional testimony relevant to the coercive effective of their continued confinement. The court has observed both Ms. Olejnik and Mr. Duran in their prior appearances before the court. Whatever the merits of their choices not to testify, their demeanor has never given the court reason to doubt their sincerity or the strength of their convictions. Courts have recognized that a trial court need not follow any particular procedure when conducting the individualized inquiry relevant to the release of a contemptuous witness. *E.g.*, *Simkin*, 715 F.2d at 38 ("[W]e think a district judge has virtually unreviewable discretion both as to the procedure he will use to reach his conclusion, and as to the merits of his conclusion."); *Braun*, 600 F.2d at 428 (finding no need for evidentiary hearing to assess coercive nature of continued confinement).

The court cannot rule out all possibility that continued confinement would convince the witnesses to testify, but it is not required to. The witnesses face confinement that could last another thirteen months, and there is always the chance that additional confinement will break the resolve of any contemnor. For these witnesses, however, their resolve appears to increase as their confinement continues. Each of them points out that to testify now would mean that the past five months of their confinement was for naught. That conviction is unlikely to lessen as their confinement goes on.

Although the Government does not bear the burden here, the court notes that it has not provided any evidence that continued confinement is likely to coerce testimony. It has instead relied on the generalized notion that lengthier confinement is more coercive than a shorter term of confinement. The court does not doubt the truth of that proposition as a general matter, but it finds that Ms. Olejnik and Mr. Duran have shown that it no longer applies to them.

The witnesses and the Government also invite the court to consider arguments specific to the grand jury investigation at issue. The witnesses argue, for example, that

any testimony they could offer would be, at best, tangential to the investigation. They contend that other jurisdictions have charged people for what the witnesses believe are similar crimes without the need for tangential testimony. They also contend that the duration of their confinement already exceeds the likely imprisonment of anyone who might be convicted as a result of the grand jury's investigation. Each of these arguments, however, strays from the court's central inquiry: are these witnesses likely to testify if their confinement continues? The court observes, moreover, that the witnesses' speculations about the grand jury investigation and its likely future course are a much shakier foundation for their request for release then their personal statements about their confinement, their principles, and the reasons that they will never provide testimony.

On this record, the court concludes that there is no substantial likelihood that continued confinement would coerce Ms. Olejnik or Mr. Duran to testify. Although they remain in contempt of court, the court finds no basis for their continued confinement.

IV. CONCLUSION

For the reasons previously stated, the court GRANTS the motions to terminate the confinement of Ms. Olejnik and Mr. Duran. No. 12-GJ-145, Dkt. # 24; No. 12-GJ-149, Dkt. # 35. The court also GRANTS Ms. Olejnik's motion to file an overlength brief. No. 12-GJ-145, Dkt. # 23.

The court orders that Ms. Olejnik and Mr. Duran are to be released from custody no later than 4:00 p.m. on February 28, 2013. The court orders the Government to provide the warden of the Federal Detention Center at SeaTac with notice of this order as soon as possible.

DATED this 27th day of February, 2013.

Richard A. Jones

The Honorable Richard A. Jones
United States District Court Judge